RE TAN SIE KIONG; EX P DELTA FINANCE COMPANY BHD

HIGH COURT SABAH & SARAWAK, SIBU
SUPANG LIAN J
[BANKRUPTCY NO: 29-10-1994]
25 JANUARY 2013

BANKRUPTCY: *Discharge - Discharge of bankrupt - Appeal against - Delay in submission of statement of affairs - Whether extension granted - Whether there was reasonable excuse for delay - Whether contravened s. 16(2)(b) Bankruptcy Act 1967 - Whether factual situations envisaged in s. 33(6) Bankruptcy Act 1967 existed to negate discharge of bankrupt - Whether Director General of Insolvency carried out proper and complete report - Whether bankruptcy brought about by circumstances within bankrupt's control*

The judgment creditor ('JC'), being dissatisfied with the decision of the Senior Assistant Registrar in giving an order of discharge as a bankrupt to the judgment debtor ('JD') under s. 33 of the Bankruptcy Act 1967 ('the Act'), appealed against the decision. The JC argued that (i) the JD had committed an offence under the Act as he had breached s. 16 of the Act; (ii) three of the factual situations under s. 33(6) of the Act existed; and (iii) the Director General of Insolvency ('DGI') had not carried out a proper and complete report. In opposing the appeal, the JD raised the points, *inter alia*: (i) the debts or balance sum still payable to the creditors had been written off; (ii) the DGI's report was proper, complete and sufficient to support the JD's application for discharge; and (iii) the debtor's bankruptcy was brought about by circumstances beyond his control.

Held (allowing appeal):

(1) Section 16 of the Act requires the JD to submit a statement of affairs in the prescribed form verified by affidavit within 21 days from the date of adjudication order and receiving order ('AORO'). Although the JD herein had made the AORO and advertised it in the newspaper, the statement of affairs was only submitted more than a year after the advertisement. There was no evidence tendered either by the JD or the DGI that an extension had been granted or that there was a reasonable excuse for the JD's delay in filing the statement of affairs. The JD had clearly contravened s. 16(2)(b) of the Act and had therefore committed an offence under the Act. (paras 5 & 6)

(2) According to the DGI's report, which was made after the period of six months from the date of adjudication, the bankrupt only had furniture worth RM31,300.70. It was clearly not enough to declare the dividend of 50% on the debts proved in his bankruptcy. Thus, the presumption under s. 33(12)(a) of the Act applied, that he had continued to trade after knowing or having reason to believe himself to be insolvent. There was no contrary evidence adduced, either by the bankrupt or in the DGI's reports. In the circumstances, the factual situation envisaged in s. 33(6)(b) of the Act, that the bankrupt continued to trade after knowing or having reason to believe himself insolvent, existed. (para 10)

(3) Under s. 33(6)(m), it must be proved that the bankrupt is unable to pay 50% dividend from the available credit. In the present case, the DGI reported that the JD's asset was only sufficient to declare a dividend of 6.78%. This was insufficient and was not a reasonable amount to cover the debt incurred by the JD. Hence, the JD had shown that factual situations in s. 33(6)(a) and (m) of the Act existed and should not therefore had been discharged. (paras 11 & 13)

(4) The DGI's report failed to disclose whether the JD had other means of income besides the monthly salary. Further, there was also no mention of the JD's monthly expenses and a statement of assets owned by and in the possession of the JD, either in his name or his nominee's name, in the report. The DGI's report was therefore insufficient to support the JD's application for discharge as it fell short of disclosing his actual financial situation. (para 14)

(5) The JD, a salesman of cars, had willingly become the guarantor of the hirers who did not by themselves qualify for the hire-purchase loans. The JC had approved the loans, which otherwise would not have been approved, based on the JD's willingness to become the guarantor. Hence, it was not correct that the bankruptcy was brought about by circumstances beyond the bankrupt's control and also, it could not be said that it was not due to any extravagance on his part as he had benefited from the successful sales of the cars. (para 19)

(6) The fact of writing off is merely normal internal auditing of the JD and it did not mean that the JD had been released from the debts owed to the JC. This could not be an acceptable reason for a discharge of the JD from his bankruptcy. (para 20)

Case(s) referred to:

Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals [2010] 8 CLJ 680 CA ***(refd)***

Per Pathmasingam Mavilaganan, ex p Public Bank Bhd [2000] 2 CLJ 92 HC ***(refd)***

Public Bank Bhd v. Kok Lee Wah [2005] 5 CLJ 212 HC ***(dist)***

Re Kelvin Lee See Fooi, ex p BSN Commercial Bank Malaysia Bhd [2006] 6 CLJ 65 HC ***(foll)***

Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 16(2)(b), (3), 33(4), (6)(a), (b), (m), (12)(a)

For the appellant/judgment creditor - Ben Lau; M/s Stephen Robert & Wong Advocs

For the respondent/judgment debtor - Lee Bee Teck; M/s Tang & Tang, Wahap Ngumbang

Reported by S Barathi

JUDGMENT

Supang Lian J:

[1] The Senior Assistant Registrar on 27 July 2012 gave an order of discharge as a bankrupt to the judgment debtor under s. 33 of the Bankruptcy Act 1967 ('the Act') with costs to be taxed unless agreed. Being dissatisfied with the decision, the judgment creditor has brought this appeal to the judge in chambers.

[2] In opposing the appeal, the judgment debtor raises the following points:

(a) The judgment debtor has been made a bankrupt and has suffered the stigma of bankruptcy for 18 years;

(b) The judgment debtor was made a bankrupt by acting as a guarantor and not as the principal debtor;

(c) The other creditors Kewangan Utama Berhad, MBF Finance Berhad and Am Finance Berhad do not object to the debtor's application to be discharged from bankruptcy;

(d) Another creditor Tan Chong & Sons Motor Co Sdn Bhd has not appealed against the decision of the SAR;

(e) The DGI has no objection to the debtor's application to be discharged from bankruptcy;

(f) Whatever debts or balance sum still payable to the creditors have been written off;

(g) The bankrupt has not committed any offence under the Bankruptcy Act of the Penal Code;

(h) The DGI's report is proper, complete and sufficient to support the judgment debtor's application for discharge; and

(i) The debtor's bankruptcy was brought about by circumstances beyond his control.

[3] I have considered the written submissions of both parties and I agree with the contentions of the judgment creditor that this appeal should be allowed for reasons as follows.

[4] Firstly, as the application by the bankrupt for the discharge was made under s. 33 of the Act, the provisions of the Act must be complied with. Section 33(4) of the Act contains two limbs that provide for two factual situations where the court should refuse an order for discharge. The two limbs are:

(i) First Limb

Where a bankrupt has committed any offence under the Act, the court shall either:

(a) Refuse the discharge; or

(b) Suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension.

(ii) Second Limb

On proof of any of the facts mentioned in sub-s. (6), the court shall either:

(a) Refuse the order for discharge; or

(b) Suspend the operation of the order for a specified time; or

(c) Suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors;

or

(d) Grant an order of discharge subject to conditions as aforesaid.

Sections (6)(a) to (m) - provides for 13 factual situations the existence of any one of them could bar the court from granting the discharge order or to suspend the operation of such order.

[5] The judgment creditor argues that the judgment debtor has committed an offence under the Act as he has breached s. 16. Section 16 requires the judgment debtor to submit a statement of affairs in the prescribed form verified by affidavit within 21 days from the date of Adjudication Order and Receiving Order ("AORO"). It is not disputed that the AORO in the present case was made on 7 July 1994 and advertised in the Borneo Post on 20 August 1994. However, the judgment debtor had only submitted the statement of affairs on 29 November 1995 which is more than a year after the AORO was advertised in the Borneo Post. There is no evidence tendered either by the judgment debtor or the DGI that an extension had been granted or that there was reasonable excuse for the judgment debtor's delay in filing the statement of affairs. Yet the DGI in para. 9 of his report stated that the judgment debtor had not committed any offence under the Act.

[6] I agree with the submission of the judgment creditor that the judgment debtor had clearly contravened s. 16(2)(b) of the Act and had thus committed an offence under the Act. In similar circumstances, the Court of Appeal in *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals* [2010] 8 CLJ 680;

[2011] 2 MLJ 218 held that the bankrupt has clearly committed an offence under s. 16(2) punishable under s. 16(3) of the Act. Ramly Ali JCA, delivering judgment of the court said:

> [41] Section 33(4) of the Act, *inter alia*, provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension. In the present case the adjudication order was made on 23 November 2000, on the bankrupt's own application (not by any creditors). The bankrupt is required under s. 16(2)(a) of the Act to submit his statement of affairs with the DGI within seven days from his being adjudged bankrupt. However, the bankrupt in the present case only filed his statement of affairs with the DGI on 21 February 2001, about three months after the date of the adjudication. There is no mention in the DGI's reports that an extension of time has been granted to the bankrupt to file the statement of affairs out of time or any reasonable explanation or excuse by the bankrupt for his delay in filing the statement of affairs in the DGI's reports; and yet the DGI in his reports states that the bankrupt did not commit any offence under the Act.
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> [42] Section 16(3) of the Act provides that if the bankrupt fails, without reasonable excuse, proof whereof shall lie on him, to comply with the requirement, he shall be guilty of contempt of court and may be punished accordingly. The court has treated such non-compliance of s. 16(3) of the Act as very serious and had imposed custodial sentence on the bankrupt (see *Dato' Abdullah Hishan bin Hj Mohd Hashim v. Sharma Kumari Shukla* [2000] 7 MLJ 667). Thus, there is no doubt that a contempt of court action under s. 16(3) is an offence under the Act. The bankrupt in this present case has clearly committed an offence under s. 16(2) punishable under s. 16(3) of the Act. Yet, the DGI in his reports had the audacity to state that the bankrupt did not commit any offence under the Act.
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> [43] That being the case, the court should have refused the conditional discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors, as clearly stipulated by the first limb of s. 33(4) of the Act. There is no special reason otherwise determined by the court on this matter and the 1% dividend declared was manifestly below the minimum requirement of 50% under the said provisions.

[7] Vincent Ng J, as he then was, held likewise in an earlier decision of *Re Kelvin Lee See Fooi, ex p BSN Commercial Bank Malaysia Bhd* [2006] 6 CLJ 65.

[8] For the same reason, in my view, the judgment debtor in the present case should not have been discharged as a bankrupt as he had contravened s. 16(2)(b) of the Act and had thus committed an offence under the Act.

[9] The judgment creditor next submits that three of the factual situations under s. 33(6) exist. I do not agree that the first factual situation under s. 33(6)(a) as suggested by the judgment creditor has been proved, but I agree that the other two factual situations have been proven to exist. They are as follows.

[10] Firstly, it is provided under s. 33(6)(b), that the bankrupt has continued to trade after knowing or having reason to believe himself insolvent. Under s. 33(12)(a), there is a presumption that if at any time after the expiration of six months from the date of the adjudication the DGI reports to the court that the value of the assets which have been realised, together with the estimated value of the assets which are realisable, is insufficient to pay a dividend of 50% on the debts proved in the bankruptcy, it shall be presumed, until the contrary is proved, that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent. In the present case, according to the DGI's report which was made after the period of six months from the date of adjudication, the bankrupt only has furniture worth RM31,300.70. Clearly, this was not enough to declare the dividend of 50% on the debts proved in his bankruptcy. For that reason, the above presumption applies that he continued to trade after knowing or having reason to believe himself to be insolvent. There was no contrary evidence adduced, either by the bankrupt himself or in the DGI's reports. In my judgment, the factual situation envisaged in s. 33(6)(b) of the Act existed.

[11] Secondly, under s. 33(6)(m) it must be proved that the bankrupt is unable to pay 50% dividend from the available credit. In the present case, the DGI reported that the judgment debtor's asset was only sufficient to declare a dividend of 6.78%. I agree with the submission of the judgment creditor that this is insufficient and not a reasonable amount to cover the debt incurred by the judgment debtor. In this respect, I subscribe with the opinion of Vincent Ng J, as he then was, in *Re Kelvin Lee See Fooi*, *supra*, when he said at pp. 73-74:

> [14] More importantly, in this regard I note that the OA has not, in his report, condescended upon any particulars to show that he had concerned himself with the pertinent question of whether the

> JD would be able to settle the full debt or at least 50% of same if a conditional discharge is granted by this court. From the contents of the OA's report it is apparent therefore that the dividend declared is insufficient and is not a reasonable or fair amount to cover the debt incurred by the JD. In my view to allow the discharge of a JD on these terms will make a mockery of the right to bankruptcy proceedings available to creditors, and of the provisions of law legislated to safeguard the interests of creditors. It will not only lead to a decline in business morality but will also result in great injustice to judgment creditors.

[12] Similarly, in *Per Pathmasingam Mavilaganan, ex p Public Bank Bhd* [2000] 2 CLJ 92, the court held that the bankrupt in that case should not be discharged because his assets were sufficient to declare only a dividend of 31.27%.

[13] For the reason that the judgment debtor has shown that the factual situations in ss. 33(6)(a) and (m) of the Act exist, the bankrupt in the present case should not have been discharged.

[14] In addition, the judgment creditor submits that the judgment debtor should not have been discharged because the DGI had not carried out a proper and complete report. The DGI's report failed to disclose whether the judgment debtor has other means of income besides the monthly salary. The monthly expenses of the judgment debtor were also not indicated in the report. Furthermore, a statement of whatever assets owned by and in the possession of the judgment debtor either in his name or nominee's name, failed to find its place in the report. The judgment creditor thus submits that the DGI's report is insufficient to support the judgment debtor's application for discharge as it fell short of disclosing the actual financial situation of the judgment debtor.

[15] With respect, I also agree with the contention of the judgment creditor on this issue. In support, I again with gratitude, apply what His Lordship Vincent J said in *Re Kelvin Lee See Fooi*, *supra*, at p. 71, as follows:

> [7] If the court minded to grant the application for discharge the court must surely know the financial situation of the JD in order to determine how the balance of the debt could be settled. Furthermore, the OA in his report failed to disclose the monthly salary of the JD and whether he has any other means of income besides what he had disclosed. The monthly expenses of the judgment debtor was also not indicated in the report. Furthermore, what other assets owned by and in possession of the JD, either

in his name or in his nominee/s, failed to find its place in the report. I would thus hold that the OA has failed to produce a competent report receivable by this court under s. 31(1) of the Act. I would thus hold that the OA's report is not sufficient to support the JD's application for discharge, as it fell far short of disclosing the actual financial situation of the JD and the report must be disregarded.

[16] The above views expressed by Vincent Ng J, are reiterated in *Lim Hun Swee*, *supra*, where Ramly Ali JCA said at pp. 688-689 (CLJ); pp. 226-227 (MLJ):

[12] In dealing with the application for discharge the court shall take into consideration a report of the official assignee (the DGI) as to the bankrupt's conduct and affair, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. Thus, in an application of this nature, a report of the DGI is very vital, in fact the most important consideration. Even though the court shall consider the DGI report as required under s. 33(3), the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all the material facts or information relating to the bankruptcy particularly on issues stipulated under s. 33(4) and (6) of the Act. The report is not only for the interest of the bankrupt and the creditors but also the interest of the public as well as the business community at large.

[17] Earlier in the decision of *Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960 at p. 963, Ian Chin J, in customary laconic fashion, remarked as follows when confronted with incomplete investigations on the part of the Official Assignee:

The Official Assignee carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the Official Assignee does not show itself equal to the task of preventing such rip-off of the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

His Lordship Ramly Ali JCA, in *Lim Hun Swee*, *supra*, quoted with approval the above words of Ian Chin J.

[18] I will now turn to the arguments raised by the judgment debtor as set out in para. [2] above. It is true that it had been 18 long years for the judgment debtor but the non-compliance with the requirements of s. 33 of the Act as discussed above militates against granting a discharge. Counsel for the judgment debtor submits that the judgment debtor did not know of the date he was made a bankrupt and could not and did not submit his statement of affairs within seven days from the date of the order. This argument gets nowhere as it is settled law that the judgment debtor is deemed to have knowledge of the order upon advertisement of the order in the Borneo Post. Furthermore, neither the judgment debtor nor the DGI had produced evidence that an extension had been granted or that there was reasonable excuse for the judgment debtor's delay in filing the statement of affairs.

[19] The judgment debtor relies on the decision of Suriyadi J, as he then was, in *Public Bank Bhd v. Kok Lee Wah* [2005] 5 CLJ 212; [2004] 4 MLJ 433 upholding the decision of the SAR to grant an absolute discharge although some debts still remain unpaid. His Lordship held that the bankruptcy was brought about by circumstances beyond the bankrupt's control and the unfortunate factor which was instrumental for her misfortune should not be held against her but to be viewed as a plus factor in her attempt to get back on her feet. To my mind, the facts of *Public Bank Bhd v. Kok Lee Wah* can be distinguished. In our present case, the judgment creditor had filed 13 proofs of debts ("POD") against the judgment debtor as reflected in the DGI's report. The judgment creditor does not dispute that the reason for the judgment debtor's bankruptcy was because he acted mostly as a guarantor. However, one of the PODs filed by the judgment creditor shows that the judgment debtor was in fact a hirer. This is reflected in a letter from the DGI dated 14 January 2011. More importantly, it is not in dispute that the judgment debtor was the salesman of cars at the material time and he would receive commissions from the company for the cars that he sold. Besides that, in order to boost his sales, he willingly became the guarantor of the hirers who did not by themselves qualify for the hire-purchase loans. The judgment creditor had approved the loans, which otherwise would not have been approved, based on the judgment debtor's willingness to become the guarantor. Thus, I

agree with the submission of the judgment creditor that it is not correct that bankruptcy was brought about by circumstances beyond the bankrupt's control. It also cannot be said that it was not due to any extravagance on his part as he had benefited from the successful sales of the cars.

[20] With regard the argument that the debts had been written off, I accept that the fact of writing off is merely normal internal auditing of the judgment creditor. It does not mean that the judgment debtor had been released from the debts owed to the judgment creditor. If such an argument be countenanced, it will only encourage borrowers to get loans from any bank, purposely default in payments and ride out the years for the loans to be written off by the bank. This cannot be acceptable reason for a discharge of the judgment debtor from his bankruptcy.

[21] As to the argument that the other creditors do not object to the application for discharge, according to the report of the DGI, out of the 19 PODs filed against the judgment debtor, 13 were filed by the judgment creditor. The total amount admitted is RM207,341.86 and that is more than 53% of the amount admitted by the DGI. To my mind, this is sufficient for the judgment creditor to oppose the discharge unless and until the judgment debtor pays 50% dividend to the judgment creditor.

[22] Based on the considerations above, to allow a discharge of the bankrupt in the present circumstances would, to borrow the words of Ramly Ali JCA in *Lim Hun Swee*, *supra*, make a mockery of the provisions of the bankruptcy law available to safeguard the interest of creditors. As His Lordship had further observed, it will not only lead to a decline in business morality but will also result in great injustice to legitimate creditors.

[23] For all the reasons given above, the appeal is allowed and the order of the learned SAR allowing a discharge of the bankrupt is hereby set aside with costs of RM2000.